United States Department of Labor
Employees' Compensation Appeals Board

C.F., Appellant	)	
and	)	**Docket No. 19-0493**
	)	**Issued: September 4, 2019**
U.S. DEFENSE AGENCIES, LAKEHURST COMMISSARY, Lakehurst, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2019 appellant, through counsel, filed a timely appeal from a July 16, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On September 22, 2017 appellant, then a 68-year-old sales store checker, filed a notice of recurrence (Form CA-2a) of medical care beginning on July 15, 2017 from the accepted June 30, 2017 employment injury under OWCP File No. xxxxxx417. He explained that he returned to light-duty employment following his June 30, 2017 employment injury and that, after working two eight-hour shifts at the self-checkout, he experienced increased back, arm, knee, and shoulder pain. Appellant stopped work on July 18, 2017. OWCP converted the recurrence claim seeking further medical treatment into an occupational disease claim. It assigned the present claim OWCP File No. xxxxxx152.[3]

OWCP received August 10, September 14, and October 19 and 30, 2017 reports from Dr. Laura E. Ross, an osteopath Board-certified in orthopedic surgery, who noted the history of appellant's June 30, 2017 employment injury and opined that the diagnosed conditions were causally related to the June 30, 2017 employment injury.

OWCP also received work excuse notes from Dr. Ross dated August 10 and October 19, 2017 and from Dr. Nishi Sahay, a Board-certified internist, dated July 18 and August 2, 2017; a September 8, 2017 diagnostic report; and physical therapy reports dated September 18 through November 21, 2017. It also received multiple claims for compensation (Form CA-7) from appellant for the period August 15, 2017 onward.

In a December 13, 2017 development letter, OWCP informed appellant that it had administratively converted the claim for recurrence for further medical care into a new occupational disease claim. It advised him of the factual and medical deficiencies in the evidence of record for a new occupational disease to be accepted. OWCP requested additional factual and medical evidence, including appellant's responses to a questionnaire. In a separate December 13, 2017 letter, it requested information from the employing establishment pertaining to his employment duties following his return to work. OWCP afforded both appellant and the employing establishment 30 days for the submission of the additional evidence.

No further evidence was received from either appellant or the employing establishment regarding appellant's alleged employment factors of July 14 and 15, 2017.

By decision dated January 31, 2018, OWCP denied the claim finding that the factual component of fact of injury had not been met. It noted that appellant had not provided a clear

[3] Under OWCP File No. xxxxxx417, OWCP accepted the conditions of right knee laceration and sprain, and right elbow laceration, fracture and abrasion from a June 30, 2017 traumatic injury which occurred when appellant tripped on a sidewalk and fell while in the performance of duty. It has administratively combined the present claim with File No. xxxxxx417, with the latter designated as the master file.

description of the particular duties he was performing during the two eight-hour shifts on July 14 and 15, 2017 and that he had not responded to the December 13, 2017 development letter.

On February 14, 2018 OWCP received appellant's request for a hearing before an OWCP hearing representative.

A video hearing was held on May 23, 2018. Appellant testified that on July 14 and 15, 2017 he was working light duty using only one arm and that he was either seated or assisting customers with machine glitches, and opening bags, amongst other duties. Counsel argued that OWCP erred in converting the recurrence claim into a new occupational disease claim. No additional evidence was submitted.

By decision dated July 16, 2018, the hearing representative modified the prior decision to accept that the factors of employment occurred as alleged, but affirmed the denial of appellant's claim finding that the medical component of fact of injury had not been met as appellant had submitted no medical evidence containing a diagnosis in connection with the accepted employment factors he set forth in his hearing testimony.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability from work for which he or she claims compensation is causally related to that employment injury.[5]

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.[6] This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.[7] OWCP's procedures require that where recurrent disability from work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship.[8] OWCP regulations define an occupational illness as a condition produced by the work environment over a period longer than

[4] *See supra* note 1.

[5] 20 C.F.R. § 10.115(e), (f); *A.R.*, Docket No. 18-1728 (issued March 19, 2019); *T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[6] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

[7] *Id*.; *see also R.L.*, Docket No. 19-0444 (issued July 29, 2019).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

a single workday or shift.[9] To establish an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[10]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[11] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[12]

ANALYSIS

The Board finds that this case is not in posture for a decision.

Appellant filed a notice of recurrence of disability for medical care after working two eight-hour shifts following a return to limited-duty work from an accepted June 30, 2017 employment injury. He thereafter filed wage-loss compensation claims for total disability. In a claim development letter, OWCP informed appellant that it had *sua sponte* converted his claim from a recurrence claim into an occupational disease claim for a new injury.

OWCP's procedures provide the proper steps required for the conversion of a claim for FECA benefits when it determines that a claimant has filed an improper claim form.[13] This procedure requires that the claim be developed on the claim form filed by claimant with questions sent to him or her to determine the type of benefits actually sought. The Board finds that OWCP failed to follow its procedures when it administratively converted appellant's claim from a recurrence claim to a new occupational disease claim without development of the issue of what benefits had been requested. As appellant filed a notice of recurrence and subsequent claims for wage-loss compensation within 90 days of his return to work, and because he noted no new

[9] *Id*. at § 10.5(ee).

[10] *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[11] *B.J.*, Docket No. 19-0417 (issued July 11, 2019); *A.M.*, Docket No. 18-0685 (issued October 26, 2018).

[12] *B.J.*, *id.*; *E.V.*, Docket No. 18-0106 (issued April 5, 2018).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(2) (June 2011); *Richard D. Wray*, 45 ECAB 758 (issued July 8, 1994) (If the actual benefits claimed by the claimant cannot be determined from review of the form, OWCP should develop the claim based upon the claim form filed and direct questions to the claimant to determine the type of benefits claimed. Based upon the response to the development letter, it should make a determination as to whether the correct claim was established and, if not, OWCP should convert the claim to the proper type of claim and notify the claimant and employing establishment of the conversion.); *C.f. S.N.*, Docket No. 12-1814 (issued March 11, 2013).

conditions following this return to a limited-duty position, OWCP should have developed the claim as one for a recurrence under OWCP File No. xxxxxx417.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[14] Consequently, the Board will remand the case for OWCP to properly adjudicate the claim for recurrence applying the appropriate procedures for a claimed recurrence within 90 days of a return to work. After such further development as may be deemed necessary, the Board shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 4, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[14] *O.S.*, Docket No. 18-1549 (issued February 7, 2019); *G.C.*, Docket No. 18-0842 (issued December 20, 2018); *see also Jimmy A. Hammons*, 51 ECAB 219 (1999).